PP

v.

ABDUL MALIK ABDULLAH

HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[CRIMINAL APPEAL NO: 42H-31-02-2012]
23 OCTOBER 2012

CRIMINAL PROCEDURE: *Sentence - Appeal against - Two charges of statutory rape - Adequacy of sentence - Factors considered - Whether character of accused relevant - Whether Sessions Court judge correct in disregarding principles of sentencing in favour of plea bargaining - Whether totality principle taken into consideration - Whether sentences to run consecutively or concurrently*

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Plea of guilt - Whether only factor considered - Whether sentence to reflect gravity of offence - Whether public interest taken into consideration - Whether sentence appropriate*

The accused was charged with two counts of statutory rape, an offence punishable under s. 376 of the Penal Code. The accused pleaded guilty to both charges and was sentenced to five years' imprisonment with one stroke of rotan for the first charge and six years' imprisonment with two strokes of rotan for the second charge and both sentences were ordered to run concurrently. The prosecution being dissatisfied appealed against the sentence.

Held (allowing appeal; enhancing sentence of imprisonment):

(1) The true character of the accused, as disclosed by the facts tendered by the prosecution, was of a person having sexually depraved mind with no hesitancy of applying it on young innocent girls. Such a person should not be easily released into the society, as to do so would invite more calamity and danger especially to young girls. (para 8)

(2) In sentencing, an accused's plea of guilt was not the only factor that a judge had to consider. Although plea of guilt is accepted as a mitigating factor, there are other factors that must be taken into consideration, one of it being public interest. In the present case, the learned Sessions Court Judge had totally ignored the facts of the case whereby he did not consider the gravity of the offence committed as spelt out in the facts of the case. (paras 9-12)

(3) Any agreement as to sentence does not fetter the discretion of the judge in imposing the appropriate sentence based on the circumstances of the case. The plea bargaining also certainly does not displace the principles of sentencing to be imposed in a particular case. However, in the instant case, although the Sessions Court Judge felt that a more severe sentence was appropriate, he chose to disregard it in favour of the plea bargaining between the prosecution and the defence. (paras 14 & 15)

(4) The judge failed to appreciate the principles of sentencing and shown uncertainty in the sentence imposed and left it to the higher court to correct him. The law does not allow for uncertainty. He must be absolutely sure of the decisions he makes and must take full responsibilities for the decision made. In the instant case, it was wrong for the judge to admit that he was not absolutely sure he had passed the correct sentence. (paras 13, 14, 17 & 18)

(5) It is a common principle that, where two or more offences committed by the accused are distinct offences, the appropriate sentence should be consecutive rather than concurrent. However, the totality principle must be taken into consideration; *PP lwn. Ahmad Osman* (foll). Taking into account the age of the accused and that he had committed the offence twice at different dates, the accused was sentenced to ten years' imprisonment for each charge to run consecutively from the date of sentence in the Sessions Court and the sentences of one stroke of the rotan for the first charge and two strokes of rotan for the second charge were maintained. (paras 19 & 20)

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(foll)***
PP lwn. Ahmad Osman [1998] 1 CLJ 66 HC ***(foll)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
R v. Kenneth John Ball 35 Cr App R 164 ***(refd)***
R v. Seargent [1970] 60 Cr App R 74 ***(refd)***
Teo Chin Hwa v. PP [2000] 1 CLJ 224 CA ***(refd)***

For the prosecution - Norhani Mohamad Adzhar; DPP
For the accused - A Saravanan; M/s Vanan & Co

Reported by S Barathi

JUDGMENT

Akhtar Tahir J:

[1] The accused in this case faced two charges of statutory rape as follows:

> **Pertuduhan Pertama:**
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> Bahawa kamu pada bulan Februari 2010, jam lebih kurang 8 malam, di alamat No. 117, Jalan Dato' Harun, Kampung Dato' Harun, 48200 Serendah, di dalam daerah Hulu Selangor, di dalam negeri Selangor Darul Ehsan didapati kamu telah melakukan kesalahan rogol terhadap (1)(P)(I) Nama: Amala a/p Rama KPT: 950818-10-5810, yang pada masa itu adalah di bawah umur enam belas tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.
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> **Pertuduhan Kedua:**
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> Bahawa kamu pada bulan November 2010, jam lebih kurang antara 5 petang, di alamat No. 39D, Jalan Kolam Air, 44000 Kuala Kubu Bharu, di dalam daerah Hulu Selangor, di dalam negeri Selangor Darul Ehsan didapati kamu telah melakukan kesalahan rogol terhadap seorang perempuan India nama: Amala a/p Rama KPT: 950818-10-5810, yang pada masa itu adalah di bawah umur enam belas tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[2] The accused pleaded guilty to both the charges and was sentenced for the first charge to five years imprisonment and one stroke of the rotan and for the second charge six years imprisonment with two strokes of the rotan. Both the sentences of imprisonment were ordered to run concurrently. The prosecution being dissatisfied with the sentence imposed appealed against the sentence.

[3] It is an established principle of law that an appellate court will not disturb the sentence imposed upon by a lower court unless the lower court has erred by imposing a sentence which is manifestly lenient or manifestly excessive taking into account the facts of the case. See the cases of *PP v. Loo Choon Fatt* [1976] 1 LNS 102; *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; *Teo Chin Hwa v. PP* [2000] 1 CLJ 224.

[4] What then are the facts of the case? In this case the prosecution had tendered seven pages of type written facts this alone alludes to the seriousness of the offence. The facts as summarised shows that the victim a 15 years old girl was enrolled by her parents into a yoga class run by the accused.

[5] The victim was apparently under a depression as a result of a failed relationship with a boy. This provided an opportunity to the accused to come close to the victim on the pretext of counselling the victim. The counselling session took a sinister twist when the accused enticed the victim to have sex with him. The sexual liaisons happened more than once as detailed out in the facts for the purposes of the two charges.

[6] Apparently the victim was not the only person under the charge of the accused. The activity of the accused came into light when another girl attending the yoga class conducted by the accused was reported missing by her mother. As a result of police investigation the police found three other girls at the yoga center run by the accused.

[7] The police also found an assortment of sexual equipment in the cupboard belonging to the accused. The victim was sent for medical examination and a number of items were sent for chemist analysis. All the tests conducted confirmed that the victim did have sexual intercourse with the accused.

[8] The facts as tendered by the prosecution clearly showed the true character of the accused as a person having sexually depraved mind with no hesitancy of applying it on young innocent girls. Surely such a person should not be easily released into the society, as to do so would invite more calamity and danger especially to young girls.

[9] In his grounds of judgment the learned Sessions Court Judge chose to totally ignore the facts of the case. Nowhere in his judgment had the learned judge considered the gravity of the offence committed as spelt out in the facts of the case.

[10] On the contrary the learned judge considered only one factor in sentencing the accused in this case that is the plea of guilt of the accused. Surely in sentencing this is not the only factor that a judge has to consider. There are countless cases which specify

the factors a judge should take into consideration in sentencing. Nowhere it is more succinctly stated than in the case of *R v. Seargent* [1970] 60 Cr App R 74 by Lawton LJ as follows:

> Those classical principles are summed in four words, retribution, deterrence, prevention and rehabilitation. Any Judge who comes to sentence ought always to have those four classical principles to mind and to apply them to the facts of the case to see which of them has the greatest importance in the case which he is dealing.

[11] The Malaysian courts have also on numerous occasions elucidated the manner of a plea guilt is to be accepted as a mitigating factor. The judgment of Augustine Paul JCA (as His Lordship then was) in the case of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 is a stark reminder of how a plea of guilt is to be treated. His Lordship states as follows:

> The learned judge appears to have taken the view that credit should be given in every case where a person pleads guilty. The position in law is that it is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v. PP* [1975] 1 LNS 158; *PP v. Sulaiman Ahmad* [1993] 1 MLJ 74; *PP v. Ravindran & Ors* [1992] 1 LNS 47). The discount that is given is normally a reduction of the sentence by about a third of what would otherwise have been imposed (see *Mohamed Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; *PP v. Muhari Mohd Jani & Anor* [1996] 3 MLJ 116; *Christopher Khoo Ewe Cheng v. PP* [1993] 3 MLJ 881). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441; *PP v. Leo Say & Ors* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v. Zaidon Shariff* [1990] 1 LNS 146). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnelly v. R* [1997] 91 A Crim R 550 at p. 554:
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> > A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances.
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> The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v. PP* [1979] 1 LNS 48; *PP v. Oo Leng Swee & Ors* [1981] 1 LNS

A 109). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also given way (see *Sim Gek Yong v. PP* [1995] 1 SLR 537; *PP v. Govindnan Chinden Nair* [1998] 2 CLJ 370).

B **[12]** The above case highlights another factor of sentencing that of public interest. Public interest is clearly defined in the celebrated case of *R v. Kenneth John Ball* 35 Cr App R 164 in the judgment of Hilebry J as follows:

> In deciding the appropriate sentence a court should be guided by
C certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but with the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as
D seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter a particular criminal from committing a crime again, or induce him to turn from criminal to an honest life. The public interest is best served, if the offender is induced to turn from criminal ways to honest
E living. Our law does not therefore, fix the sentence for a particular crime, but fixes a maximum sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

F **[13]** Apart from the judge failing to appreciate the sentencing principles enunciated in the above cases a matter of great concern to me was the last paragraph of the grounds of judgment of the learned Sessions Judge which for purposes of clarity I am putting down in full.

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> Adalah perlu dinyatakan bahawa sebelum hukuman dijatuhkan, Timbalan Pendakwa Raya, Puan Syakimah Ibrahim dan peguambela OKT, En A Saravanan mencapai persetujuan dengan hukuman tersebut sekiranya OKT berhasrat untuk mengaku salah.
H Walaupun hukuman yang lebih berat wajar dikenakan tetapi oleh kerana hukuman telah dipersetujui pertimbangan hukuman juga adalah atas dasar tersebut. Sungguhpun demikian sekiranya saya melakukan kesilapan saya sedia untuk mendapat panduan.

[14] I viewed with disbelieve two matters that has come to fore
I from the above passage. The first is the learned judge although felt that a more severe sentence was appropriate in this case chose

to disregard this fact in favour of the plea bargaining between the prosecution and the defence. Even more shocking is that in his final sentence the judge has shown uncertainty in his own imposed sentence and left it to the higher court to correct him.

[15] On the matter of plea bargaining it is clear that any agreement as to sentence does not fetter the discretion of the judge in imposing the appropriate sentence based on the circumstances of the case. The plea bargaining also certainly does not displace the principles of sentencing to be imposed in a particular case.

[16] The case of *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606 is on point where Wan Yahya J stated as follows:

> Plea bargaining between the defence and the prosecution frequently takes place in our courts, but they are normally confined to the instances of the accused pleading guilty to lesser charges or to one of several charges in exchange for withdrawal of the rest. Be it noted here that the Deputy Public Prosecutor is offering as his bargain something he is authorised by law to do, ie, not to proceed with or amend charges. But imposing sentence, let alone reducing or enhancing it, is entirely not his within the contemplation of any law.
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> This court does not consider it bound by the private bargaining between the prosecution and the defence in respect of which bargaining it is not a party and in which it has been judicially prohibited to participate. The right to impose punishment on a guilty party is absolutely the discretion of the court. It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such right. An agreement between the prosecution and the defence as to the nature of sentence to be imposed on the accused creates no obligation on the court and is good only for pricking the conscience of the defaulting party.

[17] On the second matter it is to be remembered that as a judge the paramount role is to make decisions based on law and evidence. A judge can make mistakes when deciding a case and the reason for having an appellate tier created in our judicial system is for the very purpose of correcting mistakes made by judges of a lower court. However the law does not allow for uncertainty. A judge must be absolutely sure of the decisions he makes and must take full responsibilities for such decision made. It is to address such uncertainties that principles like beyond reasonable doubt have evolved in our criminal justice system.

[18] The law certainly does not permit a judge to regard the decision making process as a learning process. The society has an expectation that each judge makes decisions based on the law and evidence and the society further expects the judge to be absolutely certain of his decision. I felt that it was absolutely wrong for the judge in this case to admit that he was not absolutely sure he had passed the correct sentence.

[19] Be that as it may, a final matter that needed determination in this case was whether the judge was right in ordering the two sentences of imprisonment to run concurrently. It is a common principle that where two or more offences committed by the accused are distinct offences the appropriate sentence should be consecutive rather than concurrent. However the totality principle as highlighted by Hishamuddin Yunus J (as His Lordship then was) in the case of *PP lwn. Ahmad Osman* [1998] 1 CLJ 66 should also be considered. His Lordship said as follows:

> Tidak sesiapa yang dapat pertikaikan bahawa keempat-empat kesalahan yang telah dilakukan oleh responden dalam rayuan ini adalah kesalahan berlainan. (distinct offences). Tidak satu pun dan kesalahan-kesalahan itu merupakan kesalahan subsidiary. Jika demikian, mengikut prinsip kesalahan berlainan (distinct offences principle), hukuman-hukuman itu hendaklah berjalan berasingan dan bukannya serentak. Ini telahpun diputuskan dengan jelasnya dalam kes *Public Prosecutor lwn. Yap Huat Heng* [1985] 2 MLJ 414 di mana Yang Arif Hakim, Shaikh Daud H (beliau ketika itu) telah memutuskan (di ms. 416):

Further on His Lordship said as follows:

> Mahkamah mengatasi dilema ini dengan memakai satu lagi prinsip yang disebutkan sebagai prinsip keseluruhan (totality principle). Mengikut prinsip ini, jika dengan pemakaian prinsip kesalahan berlainan itu akan mengakibatkan keseluruhan tempoh penjara itu menjadi terlalu panjang, maka prinsip kesalahan berlainan itu hendaklah dipakai secara berpada-pada. Ini bermakna, jika tempoh penjara itu didapati terlalu panjang kesemua kesalahan yang berlainan itu akan diperintahkan berjalan serentak; atau separuh kesalahan sahaja yang akan diperintahkan berjalan berasingan, manakala kesalahan-kesalahan yang lainnya hendaklah berjalan serentak. Prinsip ini dijelaskan oleh Prof Dr Mimi Kamariah Majid dalam bukunya *Criminal Procedure in Malaysia* (1987, University of Malaya, ms. 301) seperti berikut:
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> The totality principle requires the court to look at all the sentence imposed and decide whether in totality they are excessive. The court has to consider an appropriate punishment for each offence

and then look back to view them in totality. The court should not impose lighter sentences for individual offences simply because should the court order the punishment to run consecutively the totality appears reasonable.

[20] As a final determination of the sentence in this case and taking into account the age of the accused and that he had committed the offence twice at different dates I sentenced the accused to ten years imprisonment for each charge to run consecutively from the date of sentence in the Sessions Court. I maintained the one stroke of the rotan for the first charge and two stroke of the rotan for the second charge.